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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DESHAWN YOUNG, Plaintiff and Appellant, v. CLIFFORD BOURLAND, Defendant and Respondent.	B212076 (Los Angeles County Super. Ct. No. TC019767)

APPEAL from a judgment of the Superior Court of Los Angeles County, William Barry, Judge. Reversed.

Law Offices of Leodis C. Matthews, Leodis C. Matthews and Mariyetta A. Meyers for Plaintiff and Appellant.

Robert M. Pine, Ericksen Arbuthnot and Mark L. Kiefer for Defendant and Respondent.

Deshawn Young appeals from judgment in favor of Clifford Bourland in this action for negligent and intentional misrepresentation arising from an appraisal of real property. Young contends the trial court erred in sustaining objections to his declarations submitted in opposition to summary judgment, and that triable issues of material fact preclude summary judgment.

We conclude that while most of the evidentiary objections were well founded, sufficient admissible evidence remained to raise triable issues of material fact precluding summary judgment. We shall reverse the judgment in favor of Bourland.

FACTUAL AND PROCEDURAL SUMMARY

Young's claim is that Bourland, a real estate appraiser, made negligent and intentional misrepresentations in an appraisal of real estate Young planned to purchase. He contends that Bourland overvalued the property and failed to take into account the partially demolished condition of the house on the property.

Young was interested in purchasing a single family home in Torrance from Michael Forbes. His cousin and business partner, Anthony Little, had talked to Forbes about the property. Little told Young that Forbes was demolishing the house in order to rebuild, but encountered financial problems and could not afford to keep the property. It is undisputed that Young saw the house from the outside and was aware that it was partly demolished. According to Young's deposition, about half the house was missing. The property was lacking a complete roof and there were no rooms with closing doors that could be locked. Little had told Young in advance that the house on the property was not complete, and was worth nothing, but that the view would make a new house on the property worth more than the purchase price. Little and Young discussed tearing down what was left of the existing house and building an entirely new house. Young planned to buy the property, refinance it after six or seven months, and rebuild.

Young visited the property a second time. Both visits were at night. He and Little tried to get Forbes to reduce the purchase price because there was only part of a house on the site, but Forbes refused. In December 2004, Young entered into a real estate sales

contract with Forbes to buy the property for $799,000, but the sale was made contingent upon the property appraising at no less than that amount.

Forbes asked Bourland to perform an appraisal of the property. The parties dispute when the appraisal was completed, but the report is dated December 16, 2004. Bourland valued the property at $785,000 and noted that "[t]here were no major repairs to be made" and that the property was in "average plus" condition. As we shall explain, the evidence supports an inference that after the report was submitted, the purchase price was reduced to $789,000. According to Young, he would not have purchased the property if the appraisal was below the sales price. The first amended complaint alleges that Young obtained loans of $785,000 to finance the purchase. Escrow closed in March 2005.

Six months later, Young attempted to refinance the property. He was informed by a bank loan officer that because the single family home on the property had been half demolished, the property could be appraised at only half the purchase price. The same person told Young that the value of the property as a vacant lot would be half of the $789,000 purchase price.

Young sued the seller, his real estate broker, his mortgage company, and Bourland. He later dismissed all defendants except Bourland. Bourland's successful motion for judgment on the pleadings left only the tenth and twelfth causes of action respectively, for negligent and intentional misrepresentation.

Bourland moved for summary judgment on those causes of action, with supporting declarations and exhibits. Young opposed the motion and filed declarations and exhibits in support of his position. Bourland replied and filed evidentiary objections to the declarations in support of Young's opposition.

The motion for summary judgment came on for hearing on June 27, 2008. The court's tentative decision was to sustain the defense objections to the five declarations filed by Young in opposition because they were based on information and belief. Over defense objection, Young's attorney, Mariyetta Meyers, was allowed to amend her declaration (authenticating exhibits in opposition to the motion) at the hearing to delete

the phrase that the declaration was made "to the best of my knowledge and belief." At the hearing, the trial court was unable to locate Meyers's declaration in the court file. It is not listed on the superior court docket, was not designated by Young as part of the record on appeal, and is not in the clerk's transcript. No motion to augment the record on appeal was made. We therefore are unable to consider the content of the Meyers declaration.

The trial court denied Young's request to make similar amendments to the remaining four declarations in opposition to the summary judgment motion. The trial court sustained Bourland's objection to the remaining declarations on the ground that they were made on information and belief. It also addressed specific evidentiary objections made by Bourland to the declarations by Young and his business partner, Anthony Little, sustaining most of them. Bourland's specific objections to the declarations of Young's expert witnesses (Michael Rattelmeier and John McDowell) were overruled for lack of specificity.

The motion for summary judgment was taken under submission. After the hearing, on June 27, 2008, Young submitted corrected declarations of Rattelmeier, and McDowell. Two days later, he submitted corrected declarations for Little and himself. Bourland objected to the corrected declarations.

On June 30, 2008, the trial court issued a minute order granting the summary judgment motion. It noted that corrected declarations for McDowell and Rattelmeier had been filed which deleted the language in the last paragraph of each that the declaration was made "to the best of my knowledge and belief." Because the deleted language was the basis for the court's ruling that the declarations were insufficient as a matter of law, "[i]n the interests of justice" the trial court accepted the corrected declarations although they were late.[1] The court stated that "All other evidentiary rulings that the court made

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[1] On appeal, Bourland complains that the late filed declarations should not have been considered. He recognizes that the original declarations of Young, Little, Rattelmeier and McDowell were timely. The only change in the amended declarations was to remove the language stating that the declaration was made on information and

on June 27th stand." Summary judgment was granted "because the only two causes of action remaining against this defendant are for negligent or intentional misrepresentation, both of which are barred. See *Mariani v. Price Waterhouse*, 70 Cal.App.4th 685, 707-709, and n. 8 at p. 708 (1999) (affirming summary judgment which the trial court had entered against the same two causes of action); and *Soderberg v. McKinney*, 44 Cal.App.4th 1760 (1996)."

Young objected to the form of the proposed ruling on summary judgment submitted by Bourland. He sought reconsideration, which was denied. Judgment in favor of Bourland was entered and this timely appeal followed.

DISCUSSION

As we discuss, many of Bourland's evidentiary objections to Young's evidence were well-taken. The question is whether the remaining evidence presented by Young was sufficient to raise triable issues of material fact, compelling reversal of the judgment. We conclude it was. We begin our analysis with the evidentiary objections.

I

Young challenges parts of the trial court's order sustaining evidentiary objections to portions of his declaration and the declaration of Anthony Little. His arguments are general, without reference to particular paragraphs of either declaration. Although objections were sustained to other paragraphs of both declarations, he does not challenge those evidentiary rulings. We therefore address only the paragraphs which Young argues were erroneously excluded by the trial court.

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belief. Thus, the factual content of the declarations was unchanged, and Bourland had an adequate opportunity to respond. Under these circumstances, we conclude the trial court did not abuse its discretion in considering the amended declarations.

A. Foundation

The foundational rulings are contested by Young on the ground that the personal knowledge of the declarants was sufficient, citing Evidence Code section 702.[2] He argues: "In this case, both Little and Young testified in their declarations that they had personally negotiated with Forbes for the purchase of the property; consequently all statements made by Forbes to either Little or Young are admissible and have sufficient foundation to support them, especially in light of viewing all evidence contained in those declarations in the light most favorable to the party opposing summary judgment—here Plaintiff/Appellant."

We have reviewed Bourland's evidentiary objections to the challenged portions of declarations by appellant and Little and the trial court's rulings on the objections. The foundational objections were properly sustained as to all but paragraphs 5, 11, a portion of 24 and 32 of the Little declaration. In Young's declaration, foundational objections were proper as to all but paragraphs 13, 14, 17, 19 and 44.[3] We explain our reasoning.

The declarations by Young and by Little repeatedly exhibit the same foundational deficiencies. Little and appellant state their "belief" or "understanding" of various facts but do not explain how they gained personal knowledge of these facts. In other paragraphs, they state facts without any foundational explanation. For example, in paragraph 16, Little declared: "While I had not seen the appraisal itself, Young and I relied on its findings, which we learned soon after the appraisal was completed." Little

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[2] Evidence Code section 702 provides: "(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of that matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter. [¶] (b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony."

[3] Paragraph 28 of Young's declaration states: "The true condition of the property at the time of the appraisal could be seen in photographs of the property." Young did not say he took the photographs or saw them. Instead of foundation, the trial court sustained an objection to this statement on the grounds it was vague and ambiguous. We agree.

fails to explain how he had personal knowledge of these facts. Paragraph 18 of Young's declaration suffers from a similar deficiency. In it, Young stated that he "only later understood" about the alleged conspiracy between Forbes and Bourland to defraud him. Once again, he provides no factual basis for a "conspiracy." The trial court did not abuse its discretion in sustaining foundational objections to such statements.

We disagree with the trial court as to some of the statements in each declaration, finding sufficient foundation to support the factual assertions. Little declared in paragraph 5 of his declaration: "Because Young and I are business partners, I know that the purchase agreement contained an appraisal contingency, meaning that the property had to appraise at its purchase price before Young and I would make this investment." The evidence was sufficient to establish the existence of a business partnership between Young and Little to purchase the property, and from that we may infer Little's personal knowledge of the appraisal contingency.

In paragraph 11 of his declaration, Little states that he "made clear to Forbes that Young and I were ready to either have the property appraised or get the $30,000.00 deposit back. At that point, Forbes continued his assurances that his friend Clifford would just do the appraisal." The trial court sustained a defense objection to this statement on the grounds of hearsay and foundation. We conclude that Little's declaration provided an adequate foundation for statements made in his conversation with Forbes.

Paragraph 24 of Little's declaration states: "Young and I deposited $30,000.00 into escrow. Forbes wanted that money released immediately (and not at the close of escrow) so that he could buy some antique car." The first sentence was based on Little's participation and established his personal knowledge of the deposit. No foundation was laid for the second sentence, to which the objection was properly sustained.

In paragraph 32, Little states that anyone looking at the property could easily tell that it had been partially demolished. Since he said he viewed the property, we infer from context that he is referring to a point before escrow closed. This was sufficient foundation for the statement.

Paragraphs 13, 14, 17, and 19 of Young's declaration consist of statements apparently made by Forbes, regarding Bourland's appraisal of the property. We may infer from context that these statements were made to Young, which satisfies the foundation requirement. But there was no foundation for Young's statement that Forbes would not let anyone other than Bourland on the property for purposes of an appraisal.

The trial court sustained objections based on lack of foundation, legal conclusion and improper lay opinion to paragraph 44 in which Young lists the damages he suffered as a result of Bourland's alleged misrepresentations. We disagree with that ruling and find the statement admissible based on Young's knowledge of his own damages.

B. Hearsay

Young argues the hearsay objections made by Bourland should have been overruled because "all statements by Young and Little related to Bourland's relationship with Forbes were made upon personal knowledge and are not introduced for the truth of the statements but for the non-hearsay purposes of establishing both Young's and Forbes' state of mind and motive." Alternatively, without specifying any particular paragraph of either his declaration or Little's, Young argues that the portions of the declarations were admissible to establish inconsistent statements by Forbes.

It is Young's apparent assumption that if the declarations refer to a statement by Forbes, it either was not hearsay or was admissible under the party admission exception to the hearsay rule. Evidence Code section 1220 governs party admissions: "Evidence of a statement is not made inadmissible by the hearsay rule *when offered against the declarant in an action to which he is a party* in either his individual or representative capacity, . . ." (Italics added.) Since Forbes was dismissed from the action before the summary judgment motion was litigated, Young did not offer his statements against him. The party admission exception does not apply.

Beyond this, Young's arguments are so broad and vague as to justify the conclusion that he failed to preserve the issue for appeal. In addition, Young fails to demonstrate how Forbes' state of mind is relevant to his action against Bourland.

Nevertheless, some of the stricken statements were not offered for the truth of the matter asserted and therefore the hearsay objections were not proper as to them.

In Little's declaration, the only challenged paragraphs with adequate foundation also stricken as hearsay are 11, the second part of 24, and 32. Paragraph 11 states: "I made clear to Forbes that Young and I were ready to either have the property appraised or get the $30,000.00 deposit back. At that point, Forbes continued his assurances that his friend Clifford [Bourland] would just do the appraisal." The statement is not admissible as to what Forbes wanted or said because it does not fall within the party admission exception to hearsay. (Evid. Code, § 1220.) The second part of paragraph 24 is about Forbes's desire to have the $30,000 deposit released immediately so he could purchase a car. This was not offered for the truth of the matter asserted, but rather to demonstrate Forbes's efforts to speed the close of escrow before the appraisal was completed. The hearsay objection was not well-taken to this statement and should not have been sustained. In paragraph 32, Little states that anyone looking at the property could easily tell that it had been partially demolished and was not in "'average plus'" condition. We see no basis for a hearsay objection to this statement.

The remaining paragraphs of Young's declaration at issue are 13, 14, 17, and 19. Paragraph 13 says that Forbes recommended his friend Cliff or Clifford to appraise the property. Paragraph 14 states that Forbes often identified Cliff or Clifford as his friend who would appraise the property at its purchase price. These statements are not offered for the truth of the matter stated by Forbes. It is established that Forbes chose Bourland as the appraiser. Paragraph 17 (that Forbes was adamant that Bourland perform the appraisal) is immaterial and while not hearsay, it is a conclusion. Paragraph 19 states that Forbes would not allow Young and Little to retain a different appraiser. This was hearsay as to what was said to Young and Little. But insofar as it relates to Forbes's decision not to permit any appraiser other than Bourland on the property, it is not hearsay and was admissible.

We will consider the portions of the Young and Little declarations which were improperly stricken, and the other evidence submitted, in our analysis of whether Young raised triable issues of material fact.

II

The only causes of action remaining on summary judgment were for negligent and intentional misrepresentation. We begin our analysis with the principles governing third party claims against a professional.

In *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja)*, the Supreme Court addressed the liability of a defendant to a third party not in privity of contract. (*Id*. at p. 648.) The court identified factors relevant to this determination: "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm."[4] (*Id*. at p. 650.)

Bourland cites *Gay v. Broder* (1980) 109 Cal.App.3d 66, 75, for the proposition that an appraiser retained by a lender to express an opinion on a borrower's collateral for financing purposes owes no duty of care to a third party borrower. In that case, a veteran's application for a Veterans Administration guaranteed home loan was denied because the house appraised at less than the sale price. The Veterans Administration has a statutory duty to appraise the property. (*Id*. at p. 69.) The veteran sued the appraiser for negligence and breach of contract, claiming the appraiser owed him a duty to exercise reasonable care under the principles announced in *Biakanja*, *supra*, 49 Cal.2d 647.

The court in *Gay v. Broder*, *supra*, 109 Cal.App.3d 66 concluded that the list of factors identified in *Biakanja* was not all-inclusive. It reasoned that the determination of duty to a particular plaintiff is a question of law dependent on the weighing of policy considerations. (*Id*. at p. 74.) In light of its conclusion that the relevant provisions of the

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[4] In *Biakanja*, the court concluded that a notary who negligently prepared a will that was intended to benefit the plaintiff, was liable. (*Biakanja*, *supra*, 49 Cal.2d at pp. 650-651.)

federal law governing loans to veterans were designed to protect the Veterans Administration and not the veteran, the court held that the appraiser's duty was to the Veterans Administration and that potential liability to an applicant veteran would cause the appraiser to breach his duty to the government. (*Id*. at p. 75.)

Bourland also cites *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089 (*Nymark*), an action by a borrower against a savings and loan association based on negligent appraisal of the property. The Court of Appeal held that the defendant did not owe a duty of care to the borrower and affirmed summary judgment on the negligence cause of action. (*Id*. at pp. 1096-1099, 1100.) The court reasoned that the defendant performed the appraisal in the usual course and scope of its loan processing procedures, which were intended to protect its interests by ensuring adequate security for the loan. There was no indication that the appraisal was intended to induce the plaintiff to enter into the loan transaction. (*Id*. at pp. 1096-1097.)

After *Gay v. Broder*, *supra*, 109 Cal.App.3d 66 and *Nymark*, *supra*, 231 Cal.App.3d 1089 were decided, the Supreme Court revisited the question of duty in third party claims in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*). The issue was "whether and to what extent an accountant's duty of care in the preparation of an independent audit of a client's financial statements extends to persons other than the client." (*Id*. at p. 375.) Plaintiffs were investors in a company. Defendant accounting firm was retained by the company to perform audits and issue audit reports on the company's financial statements. Defendant issued "unqualified" audit opinions, stating that upon review, the company's financial statements fairly presented its financial position. The reports were addressed to the company. The plaintiffs testified that their investments were made in reliance on defendant's unqualified audit opinions.[5] (*Id*. at pp. 377-378.) Plaintiffs ultimately lost their investments when the company was forced

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[5] One plaintiff did not rely on the audit reports. Judgment in his favor was reversed and no issue was raised in the *Bily* matter as to him. (*Bily*, *supra*, 3 Cal.4th at p. 378, fn. 2.)

into bankruptcy. They sued defendants for fraud, negligent misrepresentation, and professional negligence. (*Id*. at p. 379.)

The *Bily* court concluded that "an auditor's liability for general negligence in the conduct of an audit of its client's financial statements is confined to the client, i.e., the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory." (3 Cal.4th at p. 406.) The court examined the distinction between a cause of action for general negligence and a cause of action for negligent misrepresentation.

"Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit. 'Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit.' (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 720 at p. 819; see also § 1572, subd. 2 ['[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true']; § 1710, subd. 2 ['[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true'].)" (*Bily*, *supra*, 3 Cal.4th at pp. 407-408.)

Representations by a professional expressing an opinion may be the basis for liability for negligent misrepresentation. "Under certain circumstances, expressions of professional opinion are treated as representations of fact. When a statement, although in the form of an opinion, is 'not a casual expression of belief' but 'a deliberate affirmation of the matters stated,' it may be regarded as a positive assertion of fact. [Citation.] Moreover, when a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact. [Citations.]" (*Bily*, *supra*, 3 Cal.4th at p. 408.) The statements in audit opinions were found to fall within these principles. (*Ibid.*)

The question in *Bily* was whether the investors were entitled to rely on the auditor's representations. Traditionally, the "the person or 'class of persons entitled to rely upon the representations is restricted to those to whom or for whom the misrepresentations were made. Even though the defendant should have anticipated that the misinformation might reach others, he is not liable to them.' [Citations.]" (*Bily*, *supra*, 3 Cal.4th at p. 408.) The Supreme Court adopted the approach of the Restatement Second of Torts section 552, subdivision (b). (*Id*. at p. 408.)

Section 552 of the Restatement states "a general principle that one who negligently supplies false information 'for the guidance of others in their business transactions' is liable for economic loss suffered by the recipients in justifiable reliance on the information. (*Id.*, subd. (1).) But the liability created by the general principle is expressly limited to loss suffered: '(a) [B]y the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or *knows that the recipient intends to supply it*; and (b) through reliance upon it in a transaction *that he intends the information to influence or knows that the recipient so intends* or in a substantially similar transaction.' (*Id.*, subd. (2).)" (*Bily, supra*, 3 Cal.4th at p. 392, quoting Rest.2d Torts; italics added.)

The Supreme Court rejected criticism of the Restatement approach: "As the authors of section 552 observe, liability should be confined to cases in which the supplier '*manifests* an intent to supply the information for the *sort of use* in which the plaintiff's loss occurs.' (*Id*., com. (a), italics added.)" (*Bily, supra*, 3 Cal.4th at p. 409, quoting Rest.2d Torts.) The court concluded that intended beneficiaries of the audit report are entitled to recovery on a negligent misrepresentation theory. (*Id*. at pp. 409-412.) In light of these principles, the *Bily* court suggested that the pattern jury instruction be revised in such cases to read: "'The representation must have been made with the intent to induce plaintiff, or a particular class of persons to which plaintiff belongs, to act in reliance upon the representation in a specific transaction, or a specific type of transaction, that defendant intended to influence. Defendant is deemed to have intended to influence [its client's] transaction with plaintiff whenever defendant knows with substantial

certainty that plaintiff, or the particular class of persons to which plaintiff belongs, will rely on the representation in the course of the transaction. If others become aware of the representation and act upon it, there is no liability even though defendant should reasonably have foreseen such a possibility.'" (*Id*. at p. 414.)

The *Bily* court anticipated application of these principles in the context of summary adjudication, recognizing that the question of intent to benefit a third party is not inevitably a question of fact. "If competent evidence does not permit a reasonable inference that the auditor supplied its report with knowledge of the existence of a specific transaction or a well-defined type of transaction which the report was intended to influence, the auditor is not placed on notice of the risks of the audit engagement. In such cases, summary adjudication will be appropriate because plaintiff will not, as a matter of law, fall within the class of intended beneficiaries." (*Bily*, *supra*, 3 Cal.4th at pp. 414-415.)

Where the cause of action is for intentional fraud, different policy considerations are involved. (*Bily*, *supra*, 3 Cal.4th at p. 415.) "By joining with its client in an intentional deceit, the auditor thrusts itself into a primary and nefarious role in the transaction." (*Ibid.*) The *Bily* court explained that "[i]n this context, the auditor's actual knowledge of the false or baseless character of its opinion is not required: 'If the defendant has no belief in the truth of the statement, and makes it recklessly, without knowing whether it is true or false, the element of scienter is satisfied.' [Citations.]" (*Ibid.*)

A revision of the pattern instruction on intentional misrepresentation was recommended by the Supreme Court: "'The representation must have been made with the intent to defraud plaintiff, or a particular class of persons to which plaintiff belongs, whom defendant intended or *reasonably should have for[e]seen would rely upon the representation. One who makes a representation with intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that category who is actually misled thereby*.' (See BAJI No. 12.50 [third alternative]; § 1711.)" (*Bily*, *supra*, 3 Cal.4th at p. 415, italics added.)

The significant distinction between a cause of action for negligent misrepresentation and one for general negligence as explained by the court in *Bily* undermines Bourland's reliance on *Nymark*, *supra*, 231 Cal.App.3d 1089, 1093, footnote 2, which involved an action for negligence only. As we have seen, the principles governing a cause of action for negligent misrepresentation to a third party, such as the claim made here, are quite different. In addition, in *Nymark*, there was no evidence the appraisal was intended to benefit the borrower. (*Soderberg v. McKinney*, *supra*, 44 Cal.App.4th 1760, 1770, fn. 5 (*Soderberg*).) Therefore, we decline to apply *Nymark*. *Gay v. Broder*, *supra*, 109 Cal.App.3d 66, on which Bourland relies, is distinguishable for similar reasons. In that action, the sole purpose of the appraisal was to assist the lender in deciding whether to make the loan. (*Soderberg*, *supra*, 44 Cal.App.4th at p. 1770, fn. 5.)

In *Soderberg*, *supra*, 44 Cal.App.4th 1760, the court extended the *Bily* principles to real estate appraisers. (*Id*. at p. 1768.) In that case, a mortgage broker contacted the trustee of a trust which had previously invested pension money in loans secured by first and second deeds of trust. The primary criterion employed by the trust in making such investments was the loan-to-value ratio (the difference between total outstanding loans and the appraised value of the property). (*Id*. at p. 1763.) The appraisal report in *Soderberg* was provided to the trustee. In reliance on the appraisal, the trustee invested trust funds and funds supplied by other parties in a second trust deed. When the borrowers defaulted, the investors sued the appraiser and the mortgage broker for fraud, negligent misrepresentation and breach of contract. The trial court granted summary adjudication on the negligent misrepresentation and breach of contract causes of action. As to the defendant appraiser, the trial court entered judgment in his favor against plaintiffs. (*Id*. at p. 1764.) The Court of Appeal reversed.

The *Soderberg* court concluded that a real estate appraiser hired by a mortgage broker need not know the potential investors by name or specific identity. "[L]iability may be appropriate where the defendant 'knows with substantial certainty that plaintiff, *or the particular class of persons to which plaintiff belongs*, will rely on the

representation in the course of the transaction.'" (*Id*. at p. 1768, quoting *Bily*, *supra*, 3 Cal.4th at p. 414.) In reaching this conclusion, the court relied on the Restatement Second of Torts, section 552, comment h, pages 132-133 which states, "'It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it.'" (*Id*. at p. 1769.) The Restatement, quoted by *Soderberg*, concludes it is sufficient that the maker of the representation "'supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given.'" (*Ibid.*)

The *Soderberg* court held that the appraiser does not have to contemplate the precise details of the transaction in which his report is ultimately used. "Liability may exist if his report is relied upon in the *type* of transaction he anticipated or in one substantially similar to it. (*Bily*, *supra*, 3 Cal.4th at pp. 392, 410.)" (*Soderberg*, *supra*, 44 Cal.App.4d at p. 1769.) It cautioned: "[I]f the size of the investment made in reliance on the appraiser's report is materially greater than what the appraiser expected, the increased risk of liability to him may preclude a duty of care to third persons." (*Id*. at p. 1769.)

Another appraiser case, *Christiansen v. Roddy* (1986) 186 Cal.App.3d 780, 787, was harmonized by the *Soderberg* court on the ground there was no evidence in that case that the appraiser knew his report would be used by third party investors. (*Soderberg*, *supra*, 44 Cal.App.4th at p. 1770.) But it rejected language in *Christiansen* suggesting the appraiser must know the specific individual investor as contrary to *Bily* and the Restatement. (*Id*. at p. 1770.)

In *Soderberg*, the appraiser filed a declaration stating he did not know that his appraisal would be communicated to or relied upon by anyone other than the mortgage broker. The appraisal report stated that its use was limited to the mortgage broker. (44 Cal.App.4th at p. 1770.) In opposition to summary adjudication, plaintiffs submitted

evidence that the appraiser had done 200 appraisals for the mortgage broker; the mortgage broker always sent a copy of the appraisal to potential investors; at times the mortgage broker contacted the appraiser with questions from investors about his reports; and the investors had relied on the report in making the investment at issue. (*Id*. at p. 1771.) An expert for plaintiffs declared that an appraiser who provides reports to a mortgage broker knows that a third party will rely on the report. (*Id*. at p. 1771.)

On this record, the court in *Soderberg* concluded that the appraiser failed to establish as a matter of law that the appraisal would be used solely by the mortgage broker. Instead, the evidence established that he knew potential investors, a group which included plaintiffs, would rely on the report in the course of the specific type of transaction the appraiser contemplated. It did not matter that the plaintiffs received the report from the broker rather than the appraiser: "An appraiser may be liable if he knew that his client would forward the report to a particular class of persons." (*Soderberg, supra*, 44 Cal.App.4th at p. 1771.) The Court of Appeal reversed summary adjudication for the appraiser. (*Id*. at p. 1772.)

Understandably, Young relies heavily upon *Soderberg*, *supra*, 44 Cal.App.4th 1760. Bourland does not address the principles in *Soderberg* which we have summarized. He provides a partial quotation from the decision: "Accordingly, liability 'is restricted to those to whom or for whom the misrepresentations were made.'" In a footnote, Bourland asserts that *Soderberg* approved the holding in *Christiansen v. Roddy*, *supra*, 186 Cal.App.3d 780 "that an appraiser was not liable to third party investors because the appraiser could not have intended . . . the third party investors to rely upon his appraisal." Bourland's treatment of *Soderberg* does not accurately reflect its holding or reasoning.

Mariani v. Price Waterhouse, supra, 70 Cal.App.4th 685 (*Mariani*), on which Bourland also relies, does not change our analysis. In that case, plaintiffs, two stockholders (who were also directors) of a corporation which leased agricultural equipment guaranteed the corporation's line of credit with various commercial lenders. A large accounting firm was retained to regularly audit the corporate financial statements

and to institute a system of checks and balances to ensure management executed directives of the board of directors. (*Id*. at pp. 690-691.) The defendant auditor issued audits which failed to accurately depict the corporation's financial status. The corporation defaulted on loans and the plaintiffs had to satisfy the corporate debt under their guaranties. An action was brought against the defendant accounting firm for negligent and intentional misrepresentation. Summary judgment was granted for lack of a triable issue of material fact as to plaintiffs' actual reliance on the audit reports or other representations. In addition, the trial court granted summary adjudication on the cause of action for negligent misrepresentation for failure to meet the standards set forth in *Bily*, *supra*, 3 Cal.4th 370. (*Id*. at p. 692.)

The trial court in *Mariani* granted summary adjudication on the negligent misrepresentation claim on the two grounds. The first is that that plaintiffs did not actually rely on defendant's representations. The second is that the defendant did not intend to induce the plaintiffs to act in reliance on its representations, as required by *Bily*, because it was not shown that defendant knew about the guaranty transactions and intended to influence them. (*Mariani*, *supra*, 70 Cal.App.4th at p. 705.) The Court of Appeal agreed that plaintiffs failed to demonstrate reliance. (*Id*. at pp. 705-707.) It also concluded that defendant did not intend to induce the plaintiffs to act in reliance on its representations. (*Id*. at pp. 707.)

Contrary to the showing in *Mariani*, *supra*, 70 Cal.App.4th 685, here Young presented sufficient evidence to raise triable issues of material fact as to both Bourland's intent to induce him to close the sale and reliance. With these principles in mind, we turn to an examination of the evidence presented on summary judgment.

III

"We review de novo a trial court's grant of summary judgment along with its resolution of any underlying issues of statutory construction. (*Barner v. Leeds* (2000) 24 Cal.4th 676, 683.) A trial court may only grant a motion for summary judgment if no triable issues of material fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *State of California v. Allstate Ins. Co.*

(2009) 45 Cal.4th 1008, 1017.) The evidence must be viewed in the light most favorable to the nonmoving party. [Citation.]" (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.)

Liability for negligent misrepresentation may be established under *Bily* and *Soderberg* if the representation was "made with the intent to induce plaintiff, or a particular class of persons to which plaintiff belongs, to act in reliance upon the representation in a specific transaction, or a specific type of transaction, that defendant intended to influence." (*Bily, supra,* 3 Cal.4th at p. 414.) Young also has a cause of action for intentional misrepresentation. "Generally, '"'[t]he elements of fraud, which give[] rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.'" [Citation.]' (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.)" (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 792.)

A. Evidence of Intent to Influence

Bourland submitted excerpts of his declaration in support of the summary judgment motion. He testified that it was Forbes, not the lender, who called him to do the appraisal. Bourland had done an appraisal 18 months earlier when Forbes purchased the property and another appraisal for Forbes on a different property. When conducting the appraisal at issue here, Bourland went to the property and saw it in its partly demolished condition. He had the prior report he had done for Forbes on the property. The photographs he attached to his December 2004 report were actually from that prior appraisal done in 2003. He did not take photographs when he visited the property in 2004, explaining that guidelines did not allow him to take photographs of people on the property, and that the presence of construction workers meant he could not take new photos at that time. He said he intended to take photographs later in 2004 but forgot. In a declaration in support of the motion, Bourland said he was aware the structure on property was partially demolished in 2004 and took that into account in his appraisal.

Bourland argues he owed no professional duty to Young and therefore Young was not entitled to rely on the appraisal report. First Bourland points out that Dean Capital Home Loans is identified in the appraisal as the "Lender/Client" rather than Young. Second, he relies on capitalized language in the appraisal report providing: "THIS SUMMARY APPRAISAL REPORT IS INTENDED FOR THE USE BY THE LENDER/CLIENT FOR A MORTGAGE FINANCE TRANSACTION ONLY. THIS REPORT IS NOT INTENDED FOR ANY OTHER USE."

In addition, Bourland cites Young's deposition testimony in which he was asked whether Forbes ever said that Bourland told him Young's plan to refinance in a few months to build a new house was possible. Young said Forbes had not told him that. Bourland contends he cannot be held legally responsible for Young's speculative plan and blames Young for engaging in speculative real estate investing.

In *Soderberg, supra*, 44 Cal.App.4th 1760, the appraisal report stated, "that it was intended to assist [the mortgage broker] in its real estate lending decisionmaking and that '[r]eproduction of this appraisal report is restricted to such use by [the mortgage broker].'" (*Id*. at p. 1770.) This evidence was not sufficient as a matter of law to entitle the mortgage broker to summary adjudication. The court in *Soderberg* considered all the evidence presented and found triable issues of material fact precluded summary adjudication. (*Id*. at pp. 1771-1772.)

We conclude the same analysis applies here. While the disclaimer contained in Bourland's appraisal report is evidence that he did not intend third parties to rely on the report and his opinion as to the value of the property, Young presented evidence from which intent may be inferred. Young's name appears repeatedly on Bourland's appraisal report, identified as "borrower" or "borrower/client." In addition, the appraisal includes the original purchase price agreed to by Forbes and Young. On the bill for his services submitted by Bourland, he listed Young as borrower. One page of the appraisal, the "Summary of Salient Features" lists both a sales price of $789,000, a date of sale (12/1/2004), and identifies Young as the "Borrower / Client."

In an admissible paragraph of Young's declaration in opposition to the motion, he said "Had the property not [been] appraised at the sales price, I would not have purchased this property." While ultimately the closing price was slightly higher than the appraised value Bourland assigned to the property, the difference is so small that it does not impact the evidentiary value of Young's declaration.

The evidence presented here is sufficient to raise a triable issue of material fact as to Bourland's intent to induce Young, or a particular class of prospective purchasers of the property to which Young belongs, to act in reliance upon the representation in the December 2004 sale of the property for which the appraisal was requested by Forbes. (*Bily, supra,* 3 Cal.4th at p. 414.)

B. Reliance

Young cites language in an addendum to the sale agreement which provides: "In the event that buyer disapproves of any of the conditions revealed in the reports or disclosures related to the property, or if buyer fails to receive loan approval, deposit money is to be returned to the buyer in full." Bourland dismisses this language, arguing that it did not make the sale contingent on an appraisal at or near the purchase price, since an appraisal is not mentioned. In his deposition, Young testified that he did not know whether Bourland was ever told that the deal would not close if the appraisal was not high enough.

Bourland submitted a February 24, 2005 amendment to the escrow instructions in support of his motion. It states that the purchase price was amended to $789,000. This was a reduction from the original $799,000 purchase price. A place for signatures by Forbes and Young is at the bottom of the form. The copy in the record bears only the signature of Forbes. It is undisputed that escrow closed in March 2005. Escrow could not have closed if Young had not signed this amendment. From this, we may infer that Young was aware the sale price was reduced after the appraisal was completed.

Young presented expert opinion testimony of Michael Rattelmeier about the need for an appraisal to convince a lender to loan him the amount he needed to fund the purchase and close escrow. Mr. Rattelmeier was experienced in bank management and

had been an independent loan officer for three years. Based on his review of photographs of the property at the time of purchase, the only loan Young would have been given is a construction or rehabilitation loan. He opined: "As of December 2004, at the time of this transaction, no reasonable lender would have lent more than 80% of the loan-to-construction costs, which would equal about 65% loan to future value. If the future value was $789,000.00, then no reasonable lender would have lent more than $512,850.00." If purchased as a vacant lot, in Rattelmeier's opinion, no lender would have lent greater than 50 percent of the appraised value or the purchase price, whichever is lower. Thus he concluded, no lender would have lent more than $394,500 on the property. Since at the time of the purchase, the property was partially demolished, the purchaser would have to complete the tear-down to turn it into vacant land, at which time it could have secured a lot loan. No reasonable lender would have lent money on the purchase money loan if the appraised value of the property was less than the amount of the loan.

According to Rattelmeier, under Fannie Mae[6] standards, a purchase money loan requires a 1004[7] appraisal, which means a physical interior and exterior appraisal. He opined: "In this transaction, if the appraisal were accurate (meaning the actual condition of the property disclosed with photographs), no lender would have lent any money for a purchase money loan because of obvious deferred maintenance." He concluded that if the appraisal by Young's expert, John McDowell, was accurate at $475,000, then according to Rattelmeier, the most a lender would have lent on this vacant lot was $237,500.

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6 Fannie Mae is the Federal National Mortgage Association. (*Puentes v. Wells Fargo Home Mortgage, Inc.* (2008) 160 Cal.App.4th 638, 641.)

7 We understand "1004" to be a reference to the Fannie Mae Uniform Residential Appraisal Report. (Carpi, Practising Law Institute, Real Estate Law & Practice Course Handbook Series, PLI Order No-005B (Nov. 2000), Ancillary Services & Products Provided by Title Insurance Companies, pp. 831, 847.)

In his deposition, Young testified that he told Forbes he planned to refinance in six or seven months to build a new structure on the property. Forbes said it should not be a problem to get a loan for that purpose within that time frame.

This evidence was sufficient to raise a triable issue of material fact as to whether Young was justified in his reliance.

C. Misrepresentations

Evidence of misrepresentations includes Bourland's admission in his deposition that his report included photographs from the prior appraisal. These photographs did not reflect the demolished state of the property as of December 2004. In addition, Young presented testimony of an expert appraiser, Rattelmeier, and of John McDowell, a certified general real estate appraiser, licensed in California. McDowell was retained by counsel for Young to review and opine on the reliability of two real property appraisals on the subject property, one by Bourland and the other by defense expert Otis Hackett.

Bourland reported the highest and best use for the property was as a single family residence, while his expert witness, Hackett, reported the highest best use was "effectively vacant land." McDowell agreed with Rattelmeier that the loan-to-value ratio for an average condition single family residence is from 80 to 100 percent while the same ratio for vacant land is 50 percent. An essentially vacant lot would have to be appraised at $1,570,000 to secure a loan of $785,000. McDowell agreed with Hackett that the property was effectively vacant land.

McDowell concluded: "Bourland's appraisal (at the very least) failed to report, or falsely reported the actual physical condition of the subject improvements, even though Bourland was aware of those facts (per the original appraisal, Bourland's declaration, and by my own 6/8/2008 inspection) and therefore misrepresented the actual HBU [highest and best use] that would determine the access to loan programs that had an affect [*sic*] upon the ultimate amount of the loans available, and now at question in this lawsuit." "Bourland admitted to being aware of the facts surrounding the improvement deficiencies, but did not mention a teardown house anywhere in the report. Instead, he described the subject improvements as a 'SINGLE FAMILY RESIDENCE, in

AVERAGE+' physical condition. This statement was false and inappropriate for all of the reasons we have noted."

McDowell found Bourland's report was "useless" with respect to the comparable market data included because the comparables were based on the erroneous highest and best use as a single family residence. In addition, in his opinion, Hackett, the appraisal expert for Bourland, failed to adjust any of the market data employed to account for the "non-typical physical characteristics present in the subject property." McDowell would have appraised the property at $475,000 as of December 2004 with the highest and best use defined as "'Effectively Vacant Land.'" He concluded that the comparable properties cited by Hackett were too dissimilar because several were "significantly closer to the ocean and beaches," all had level or nearly level topography, all had higher sales prices in terms of dollars per square foot of land, and all had newly constructed dwellings which were larger than what is physically possible or legally permissible for the subject property as currently configured.

The property has a level pad at street level, a cliff, and a pad on a lower level that is virtually inaccessible in McDowell's opinion. He found a "significant portion of the lot is not able to support improvements and is deemed nonuseable. This results in serious detriments to typical design elements, and severely limits the lot's utility in terms of building support." He disagreed with Hackett's assertion that the entire lot was useable.

This evidence was sufficient to raise triable issues of material fact precluding summary judgment on the negligent misrepresentation cause of action.

The claim for intentional misrepresentation is only cursorily addressed in Young's briefs and hardly at all in Bourland's. Bourland confines his discussion to the common element of reliance, arguing that because Young cannot demonstrate reliance, both causes of action fail.

In *Bily, supra*, 3 Cal.4th at page 415, the Supreme Court held: "[T]he auditor's actual knowledge of the false or baseless character of its opinion is not required: 'If the defendant has no belief in the truth of the statement, and makes it recklessly, without knowing whether it is true or false, the element of scienter is satisfied.' (5 Witkin,

Summary of Cal. Law, *supra,* Torts, § 705 at pp. 806-807; § 1572, subd. 1 [fraud includes '[t]he suggestion, as a fact, of that which is not true, by one who does not believe it to be true']; § 1710, subd. 1.)" The evidence we have discussed is sufficient to raise a triable issue of material fact under this standard. Bourland used outdated photographs which did not portray the actual demolished condition of the house in his appraisal. In addition, both Young's expert witness and Bourland's own expert witness concluded that the highest and best use for the property at time of sale was "effectively vacant lot." Nonetheless, Bourland used single family residences as comparables in his appraisal. His explanation that he took the condition of the property into account, if credited, might defeat the tort, but it need not be credited. Triable issues of material fact on the intentional misrepresentation cause of action preclude summary judgment.

Based on all the evidence considered in light of the principles announced in *Bily, supra,* 3 Cal.4th 370 and *Soderberg, supra,* 44 Cal.App.4th 1760, we conclude triable issues of material fact were raised by Young, precluding summary judgment.

DISPOSITION

The judgment is reversed. Young is to have his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

WILLHITE, J. SUZUKAWA, J.